

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division**

CHARLES F. LUSTER, #339867,

Petitioner,

v.

ACTION NO. 2:06cv247

GENE M. JOHNSON, Director of the
Virginia Department of Corrections,

Respondent.

FINAL ORDER

This matter was initiated by petition for a writ of habeas corpus under 28 U.S.C. § 2254. The petition alleges violation of federal rights pertaining to Petitioner's conviction on June 30, 2004, in the Circuit Court of the City of Norfolk, Virginia, for one (1) count of possession of cocaine with intent to distribute. Petitioner was sentenced to fifteen (15) years in prison, of which ten (10) years was suspended.

The matter was referred to a United States Magistrate Judge pursuant to the provisions of 28 U.S.C. § 636(b)(1)(B) and (C), Rule 72(b) of the Federal Rules of Civil Procedure and Rule 72 of the Rules of the United States District Court for the Eastern District of Virginia for report and recommendation. The report of the Magistrate Judge was filed on November 20, 2006, denying Petitioner's motion for an evidentiary hearing and recommending dismissal of the petition. By copy of the report, each party was

advised of his right to file written objections to the findings and recommendations made by the magistrate judge. On November 29, 2006, the Court received Petitioner's Notice of Response to the Magistrate Judge's Report and Recommendation.¹ The Court received no response from Respondent.

The Court, having reviewed the record and examined the objections filed by Petitioner to the Magistrate Judge's report, and having made de novo findings with respect to the portions objected to,² does hereby ADOPT AND APPROVE the findings and recommendations set forth in the report of the United States Magistrate Judge filed on November 20, 2006, and it is, therefore, ORDERED that the petition be DENIED AND DISMISSED as Petitioner's claim is not cognizable in federal habeas. It is further ORDERED that judgment be entered in favor of Respondent.

Petitioner may appeal from the judgment entered pursuant to this final order by filing a written notice of appeal with the Clerk of this Court, United States Courthouse, 600 Granby Street,

¹On December 11, 2006, the Court was notified that Luster had been transferred to another facility, Indian Creek Correctional Center, where he is presently confined.

²The Court notes that in his objections Luster cites Virginia law and again asserts that the state court committed error in denying his motion to suppress evidence obtained from a warrantless search. As the Magistrate Judge found, Luster's objections are without merit in the face of the Supreme Court's pronouncement in Stone v. Powell, 428 U.S. 465, 482 (1976), that such claims are not cognizable in federal habeas once the state court has had a full opportunity to review the claim.

Norfolk, Virginia 23510, within thirty (30) days from the date of entry of such judgment. Petitioner has failed to demonstrate "a substantial showing of the denial of a constitutional right." Therefore, the Court, pursuant to Rule 22(b) of the Federal Rules of Appellate Procedure, declines to issue a certificate of appealability. See Miller-El v. Cockrell, 537 U.S. 322, 335-36 (2003).

The Clerk shall mail a copy of this Final Order to Petitioner and to counsel of record for Respondent.

Entered on January 3, 2007

/s/
Rebecca Beach Smith
United States District Judge